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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1989

JAMES WILSON DOUGLAS,

Petitioner,

v.

LEGAL ETHICS COMMITTEE OF THE WEST VIRGINIA STATE BAR,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE WEST VIRGINIA SUPREME COURT OF APPEALS

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September 14, 1989

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QUESTIONS PRESENTED

1. Does a Court's disregard of its own attorney disciplinary rules, and demonstrable bias in directing a Bar Hearing Panel to reverse a prior ethics dismissal, deny the affected attorney due process and equal protection of the laws, in violation of the Fourteenth Amendment to the United States Constitution?

2. Is a promulgating Court, consistent with due process and equal protection precepts, bound by its own administrative rules, and do such rules, once formulated, only operate prospectively?

3. Does the Fifth Amendment of the United States Constitution, pertaining to criminal privilege against double jeopardy, applied to the various States through the Fourteenth Amendment, prevent an attorney from being retried on an ethics charge previously heard and dismissed on its merits?

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OPINIONS BELOW

The opinion of the West Virginia Supreme Court of Appeals, from which this petition is taken, appears in the appendix hereto, p. C1, *infra*, and the same is reported at ___ S.E. 2d ___ (W.Va. 1989).

The two findings of fact and recommendations of the Legal Ethics Committee of the West Virginia State Bar, dated October 25, 1986, and February 28, 1989 are not reported. The entire documents are reprinted in the appendix hereto, p. A1 and p. B1, respectively, *infra*.

JURISDICTIONAL STATEMENT

Petitioner James Wilson Douglas, an attorney, seeks review of the final judgment of the West Virginia Supreme Court of Appeals, entered July 14, 1989, suspending his license to practice law in West Virginia for a period of six (6) months, and thereby implicitly holding that Article VI, Section 17(a) of the West Virginia State Bar By-Laws, could be discarded and ignored with Constitutional impunity. By the State Court's refusal to recognize, abide by or even rule upon his Constitutional claims involving Section 17(a), timely and repeatedly raised, Petitioner's rights to due process and equal protection of the laws, as guaranteed by the Fourteenth Amendment of the Constitution of the United States, have been violated.

This petition is being docketed in this Court within 60 days from the July 20, 1989 denial of rehearing below. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(a).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

Fifth Amendment, United States Constitution:

*** nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; ***

Fourteenth Amendment, Section 1, United States Constitution:

*** No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

West Virginia State Bar By-Laws Article VI, Section 17(a):

Upon completion of the formal hearing in accordance with the provisions of section fourteen of this article, the committee shall take the following action:

(a) If the Hearing Panel determines that the case does not merit the taking of disciplinary action, it shall record its findings of fact and conclusions of law and the case shall be dismissed; ***

STATEMENT OF THE CASE

A. Procedural History

Disciplinary proceeding 85-21 was included as *Count I* in a five count *Statement of Charges* filed against Petitioner by Respondent on June 24, 1986. Evidence appertaining thereto was taken on August 18, 19, and 24, 1986, and September 15, 1986.

Following deliberations thereon, the Full Committee on Legal Ethics, in accepting the Hearing Panel's findings and recommendations, dismissed Counts I, II, IV, V and approximately one-half of Count III; and found sanction proper in the remaining portion of Count III (86-04), by report dated October 25, 1986.

Nearly five months later, on March 19, 1987, the Petitioner filed a Complaint on 86-04 in the West Virginia Supreme Court of Appeals, which, after the timely interposition of responsive pleadings, was argued on September 23, 1987.

Almost six months thereafter, on March 7, 1988, the Supreme Court issued an opinion remanding to the original Respondent's Hearing Panel 86-04 and the formerly dismissed 85-21 for further proceedings. On August 11, 1988, said Hearing Panel dismissed 86-04 but refused to further participate in 85-21.

A substitute Hearing Panel was assembled, who, by a transcripted record only, and without the benefit of any new evidence, and absent any notice of hearing to the Petitioner, reversed the initial finding of the first Hearing Panel in 85-21. Said last determination was adopted by the Full Committee on February 28, 1989, followed by a second Complaint filed in the West Virginia Supreme Court of Appeals on March 9, 1989. Subsequent to Petitioner's Special Reply, oral argument was scheduled for and held on May 2, 1989, and a decision adopting the second recommendation of the Full Committee for six (6) months sanction in 85-21 was issued on July 14, 1989. A Petition for Rehearing was denied on July 20, 1989.

B. Statement of Facts

Petitioner attorney, a single practitioner, is the divorced father and sole support of three minor children. Most recently, Petitioner was employed as Legal Coordinator with RESA IV (Regional Education Services Agency for Region IV) in Summersville, West Virginia,

which job was expressly conditioned upon his maintaining a license to practice law. Petitioner was terminated following the West Virginia Court's July 14, 1989 decision, hereby sought to be reviewed.

In an undertaking that only has a historical antecedent in the mammoth logistical preparations and complex execution of the 1944 Normandy invasion, Respondent commenced disciplinary proceedings, on June 24, 1986, against your Petitioner through the filing of a five (5) count *Statement of Charges*. Included in these comprehensive and detailed accusations was the premier case, number 85-21, identified as *Count I*, which alleged, *inter alia*, that Petitioner's premised, professional misconduct, based upon the purported facts cited therein, had been violative of the Code of Professional Responsibility, Disciplinary Rule 7-102. See *Count I*, Paragraph (11), Subparagraph (c) of the aforesaid *Statement of Charges* (not appended).

Evidentiary hearings on 85-21 were conducted before a Hearing Panel consisting of Arthur M. Recht, Esq., Chairman, Diana Everett, Esq., and John Paull, layperson, beginning on August 18, 1986 and continuing through August 19, 1986, and subsequent to a recess, reconvened on, and finished at the end of, September 15, 1986.

During the interval, the Respondent, due to a lack of diligence in procuring a witness, was permitted to take a video deposition of a witness in Cleveland, Ohio, on August 24, 1986, which was replayed for the Hearing Panel on September 15, 1986.

After the conclusion of proceedings on 85-21, which entailed the examination and cross-examination of an

approximate score of witnesses, submission of voluminous documents, and lengthy oral argument, the parties hereto were afforded an opportunity to tender briefs on all issues raised by the pleadings, including the legal aspects of Disciplinary Rule 7-102.

Taking nearly six weeks for deliberation, the Hearing Panel on October 25, 1986 returned its findings of fact and conclusions of law to the Full Committee on Legal Ethics, which report, adopted and approved by the Full Committee, as issued on the same day, recommended discipline only on a certain facet of Count III of the *Statement of Charges*, and dismissed 85-21 (Count I) and all other remaining Counts, theretofore charged, tried and submitted, as having fallen short in the burden of proof.

Consistent with the provisions of Sections 17, 18, 19 and 20, Article VI, of the State Bar By-Laws, then most recently approved by the West Virginia Supreme Court of Appeals on July 2, 1986, Respondent filed a Complaint, number 17949, on March 19, 1987, before said Court seeking only the recommended sanction on Count III. But ostensibly due to the interrelated nature and size of the five charges, Respondent submitted the complete transcript of all evidence taken or received in the entire trial of the Petitioner, which necessarily embraced the record of the then dismissed 85-21.

Sensing what he considered to be a maneuver by a Respondent disgruntled with the result in 85-21, to circumvent or evade the mandatory dismissal provisions of Section 17(a) of the By-Laws, Petitioner, citing Federal Constitutional grounds, promptly filed, on March 23,

1987, a Motion to Strike all aspects of the said Complaint and accompanying record that dealt with, alluded to, or made mention of any of the aforesaid dismissed ethics Counts, which Motion, over two (2) years later, has not been accorded a disposition.

With growing apprehension generated by the lack of responsiveness to the last named Motion, in conjunction with certain menacing measures by the West Virginia Supreme Court occurring in a case styled *Westfall et al. v. Douglas, et al.* (the Court ordered a special master to make an inquiry into accusations voiced by another attorney that the Respondent had been guilty of malfeasance or misfeasance resulting in the dismissal of Count IV, in which said attorney had had a personal interest), Petitioner lodged on April 28, 1987 his first Motion to Recuse the individual Justices of the West Virginia Supreme Court, the same being denied on July 22, 1987.

Although being somewhat acquainted with the ponderous rate with which the Chekovian wheels of justice turn, the absence of a prompt Rule to Show Cause under Section 20 of the By-Laws (Article VI), caused Petitioner to enter a Motion for a Speedy Hearing and Alternate Motion to Dismiss on July 20, 1987 in case number 17949, which was quickly refused on July 22, 1987, contemporaneously with the issuance of the long awaited Rule to Show Cause, setting the matter for argument on September 23, 1987. The latter event occurred on schedule and the issue was submitted.

On March 7, 1988, or nearly one (1) year after the initial Complaint had been filed, the West Virginia Supreme Court handed down its opinion in case number

17949. After discussing the implications of and establishing a rule for the questions raised by Count III (86-04) of the Complaint, the same was remanded to the Hearing Panel for further proceedings. However, contrary to prior practice and the mandatory language of Section 17(a), Article VI, of the By-Laws, the West Virginia Supreme Court, without notice to the Petitioner, without affording him an opportunity to be heard thereon, and without the benefit of pleadings under Section 20, *sua sponte*, revived, considered and addressed dismissed Count I (85-21) and found, *as a matter of law*, that Petitioner had violated Disciplinary Rule 7-102, which had been specifically alleged in the *Statement of Charges* and dismissed as insufficient in its burden of proof. See October 25, 1986 Report of the Full Committee on Legal Ethics, appendix, p. A2. The West Virginia Supreme Court concluded by otherwise remanding 85-21 (Section 17 [a] not being mentioned) "for reconsideration" by the original Hearing Panel, due to its having "misperceived the nature" of the Disciplinary Rule 7-102 as it had applied to this case. *L.E.C. v. Douglas*, 370 S.E. 2d 325, 336 (W.Va. 1988).

A Motion for Rehearing, based on the due process and equal protection claims of the Petitioner, arising from the 85-21 resurrection and remand, was made and denied, without comment, by the West Virginia Court on May 18, 1988.

The Recht Hearing Panel (the Bar Sub-Committee who had initially heard and dismissed 85-21) reconvened on August 11, 1988, and following the disposition of motions and representations of counsel, the remanded Count III or 86-04, upon which the Panel had originally recommended discipline, was dismissed by said Panel.

But, in regard to Count I, the Hearing Panel, notwithstanding the remand, deemed it to be "improper" and "incongruous" for it to have found that 85-21 should be dismissed and then without further evidence being tendered by the Respondent to "totally reverse itself" and recommend discipline. The Hearing Panel, in effect, refused to act on the 85-21 remand. See *L.E.C. 86-04*, August 11, 1988 transcript, pages 40 and 46. (Not appended).

In light of the original Hearing Panel's withdrawal, a new or second Hearing Panel, after some effort, was constituted, who, with no notice to Petitioner, on the basis of a cold record, no hearing, and the same evidence, complied with the West Virginia Supreme Court's implied directions and findings, as a matter of law, in *Douglas* and reversed the 85-21 dismissal, recommending a suspension of Petitioner's license for a six (6) month period. See second Full Committee report of February 28, 1989, appendix, p. B3.

Four years after it had commenced its investigation, the Respondent filed its Second Complaint against the Petitioner, under Section 20, pursuant to the last said 85-21 report, upon which a second Rule to Show Cause was issued on March 23, 1989, and specially replied to by Petitioner on March 30, 1989, who renewed his Section 17(a) due process and equal protections claims.

Before the second Rule to Show Cause had been transmitted, Petitioner on March 13, 1989 had re-asserted the West Virginia Court's recusal on the grounds that the *sua sponte* nature of and factual determination as a matter of law in the *Douglas* remand, *de facto* and *de jure*, had

made the Court a party to 85-21, in contravention of XIV Amendment protections, State law, and the Canons of Judicial Ethics. Said second Motion to Recuse was refused without opinion on March 23, 1989, and the issue was submitted with argument on May 2, 1989. The order of suspension, herein complained of, was entered on July 14, 1989 and a Petition for Rehearing relying solely on the Federal Constitution issue was denied on July 20, 1989, without elaboration. See appendix, p. F1 and p. C4, respectively.

RAISING AND PRESERVING CONSTITUTIONAL CLAIMS

At the earliest stage of the disciplinary proceeding before the West Virginia Court below, the Petitioner raised the claim, in a March 23, 1987 Motion to Strike the [First] Bar Complaint (17949), that the reference to any dismissed ethics charge therein, " . . . contravenes [Petitioner's] Federal Constitutional rights of due process and equal protection of the law, which guarantees [Petitioner] hereby invokes. United States Constitution, Amendments V and XIV." Appendix, p. D1. Said Motion was never passed upon by the West Virginia Court.

On a second occasion, Petitioner, in his Reply to Rule to Show Cause to the first Bar Complaint (17949), asserted his position that disregard of Article VI, Section 17(a) of the West Virginia State Bar By-Laws was precluded by the due process and equal protection considerations of the Fourteenth Amendment to the United States Constitution. In essence, the West Virginia Supreme Court of Appeals was Constitutionally prevented, by its

own Rule, from resurrecting an ethics charge dismissed on its merits. This point was ignored by the West Virginia Court in its remand opinion. See *L.E.C. v. Douglas*, 370 S.E. 2d 325 (W.Va. 1988).

Following the announcement of *Douglas*, Petitioner filed a March 14, 1988 Motion to Reconsider renewing his aforesaid Federal Constitutional (Fourteenth Amendment) privileges of due process and equal protection, which Motion was denied without comment on May 18, 1988.

After the Respondent had complied with the West Virginia Supreme Court's remand directive, a second Bar Complaint (19008) was entered, in response to which, Petitioner, appearing specially, caused Section 1 (due process and equal protection) of the Fourteenth Amendment to the United States Constitution to be his primary contention and sole defense. See Reply to Rule to Show Cause and Objections to Second Complaint (19008), March 30, 1989, see appendix, p. E1.

As reflected in the July 14, 1989 opinion of the West Virginia Supreme Court of Appeals, from which this appeal is taken, Petitioner's Federal claims, squarely advanced, as in the three other instances, were never even addressed. See *L.E.C. v. Douglas*, ___ S.E. 2d ___ (No. 19008, WV 1989). A Petition for Rehearing, citing only Fourteenth Amendment grounds, was denied, again without comment, on July 20, 1989. Appendix, p. F1 and p. C4, respectively.

REASONS FOR GRANTING THE WRIT

I

THE LICENSE TO PRACTICE LAW IS A CONSTITUTIONALLY PROTECTED PROPERTY RIGHT WHICH MAY NOT BE ANNULLED OR ABATED EXCEPT BY DUE PROCESS OF LAW EQUALLY APPLIED.

The United States Constitution, Amendment XIV, Section 1, consecrates one of the most revered and cherished points of organic law, which reads, in part: " . . . ; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Against this background, one may state as a general premise that a license to practice law is a right of liberty and property protected by the Fourteenth Amendment. *Konigsberg* v. *State Bar of California*, 352 U.S. 252 (1957); *Dent* v. *West Virginia*, 129 U.S. 114 (1889); *Re Summers*, 325 U.S. 561 (1945); Ex parte *Garland*, *infra*.

> The attorney and counsellor being, by the solemn judicial act of the court, clothed with his office, does not hold it as a matter of grace and favor. The right which it confers upon him to appear for suitors, and to argue causes, is something more than a mere indulgence, revocable at the pleasure of the court, or at the command of the legislature. Ex parte *Garland*, 71 U.S. (4 Wall.) 333, 378-79 (1866).

"Certainly, the practice of law is not a matter of the State's grace." *Id. supra* at 379. See also *Schware* v. *Board of Bar Examiners*, 353 U.S. 232 (1957).

Although attorney sanction is primarily designed to protect the public, it is nevertheless, a punishment, or penalty imposed on the lawyer and he is "accordingly entitled to due process" in connection with the charge. In re *Ruffalo*, 390 U.S. 544, 550 (1968). "Thus, an accused attorney may expect that he will not be condemned out of a capricious self-righteousness, . . . " but, consistent with the essentials of due process, given a fair hearing. *Kingsland* v. *Dorsey*, 338 U.S. 318, 320 (1949); See also In Re *Oliver*, 333 U.S. 257 (1948).

Succinctly, an opportunity to be heard and notice are essential to a disbarment or suspension proceeding. *State* v. *McClaugherty*, 33 W.Va. 250, 10 S.E. 407 (1889); *State* v. *Smith*, 84 W.Va. 59, 99 S.E. 332 (1919). Consistent therewith, all proper intendments are in favor of the attorney, and doubt or conflicts in evidence should be resolved in his favor. *L.E.C.* v. *Pietranton*, 142 W.Va. 501, 95 S.E. 2d 643 (1957).

With these premises in place, we proceed to another vital point. The general rule is that before a court can obtain jurisdiction of a particular subject matter, the judicial power of the Court must be invoked through proper and appropriate application as shown by the record. *State ex rel., Preissler* v. *Dostert*, 163 W.Va. 719, 260 S.E. 2d 279 (1979). Conversely, if the court's record fails to demonstrate that a person or entity has properly instituted proceedings, then such court cannot exercise jurisdiction over the case, and any order or decree issuing therefrom, purporting to treat a question raised thereby, is void. *Id.*

Applying these principles to the case at hand, Article VI, Sections 18, 19 and 20 of the West Virginia State Bar By-Laws plainly outline that ethics complaints against errant attorneys shall be instituted in the West Virginia Supreme Court of Appeals by the Complaint of the Legal Ethics Committee of the West Virginia State Bar; and only then, in cases where the Respondent finds and recommends that the case merits reprimand, suspension or annulment. Section 17 (b), Article VI.

Yet, when the Respondent filed its first complaint in 86-04 (which was subsequently abandoned following remand, on August 11, 1988), the West Virginia Court, without notice to the Petitioner, without affording Petitioner an opportunity to be heard, and without the appropriate application in the proper form prescribed by Articles VI, Sections 18, 19 and 20, *sua sponte*, and in defiance of its Section 17(a) mandatory rule, assumed jurisdiction of another ethics charge (85-21), theretofore dismissed and not complained of by the Respondent Committee; and proceeded to review the same, make factual determinations, as a matter of law (!), and then order the Hearing Panel, who originally had dismissed 85-21, to reverse its findings and engage in such proceedings as necessary, in order to reflect that Court's sentiment. *Douglas, supra,* at 336.

Aside from the West Virginia Court's *sua sponte* action in *Douglas* casting it in a light both as complainant and prosecutor, that same Court, in its administrative/judicial function, has ignored or discarded at least four of its pre-existing procedural rules in a quest to obtain a particular result, thereby denying Federal due process

and equal protection rights to your Petitioner. United States Constitution Amendment XIV.

Petitioner acknowledges that professional ethics must be enforced by the courts and respected by the Bar if public confidence in the integrity and impartiality of the judicial system is to be maintained. In re *Meeker*, 76 N.M. 354, 414 P. 2d 862 (1966). But if courts, as in the instant case, arbitrarily abandon their own rules of procedure in order to achieve a commendable, even a desirable end, how can such capricious action be said to further "public confidence in the integrity and impartiality of the administration of justice."? *Id.* at 357.

If the West Virginia Court's own rules are applied, altered and revoked liberally where expediency requires, then the public is not witness to judicial administration, but rather judicial abuse.

The rule of law is nothing if it is not predictable and uniformly applied; and the West Virginia Court's *sua sponte*, unilateral, partial action in *Douglas*, regarding 85-21, is a classic example of the absence of basic fairness and consistency that has brought the Petitioner, as others before him, to this Court for relief and vindication of his Federal Constitutional claims.

The right to practice *is* constitutionally protected as a property right and no attorney can lawfully be deprived of such right except by due process of law. In re *Ruffalo*, *Konigsberg*, and *Dent*, *supra*.

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases.

> But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. . . . This Court has said . . . that 'every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.' *Tumey* v. *Ohio*, 273 U.S. 510, 532. In Re *Murchison*, 349 U.S. 133, 136 (1955). Cf. Re *Schlesinger*, 404 Pa. 584, 172 A. 2d 835 (1961).

The anomalous and partisan nature of the *Douglas* remand in 85-21, without notice to Petitioner, without an opportunity for Petitioner to be heard, and without adhering to Sections 17, 18, 19 and 20 of Article VI of the Bar By-Laws, against the background of the Constitutional principles and propositions hereinabove cited, are strongly suggestive that the West Virginia Court's procedure herein scrutinized, as against the Federal Constitutional Standard, is wanting in due process and equal protection.

Such repeated procedural violations of due process and equal protection would never have passed muster in any normal civil or criminal litigation, and the "inherent authority" of the West Virginia Court should not be misappropriated as a vehicle to circumvent, override or supplant the Constitutional rights of an attorney that are routinely available to his clients. *Ruffalo, supra.*

After all, why should an attorney be consigned a smaller portion of Constitutional rights than the accused persons he normally represents? Is the attorney, solely by virtue of his occupation, less of a citizen? Paradoxically,

are the advocates of due process fated not to be accorded its protections?

II

COURTS HAVE INHERENT POWER TO LEGISLATE AND ADOPT ADMINISTRATIVE REGULATIONS AND PROCEDURES FOR THE CONDUCT OF ITS BUSINESS; HOWEVER, ONCE THE PROMULGATING COURT HAS ESTABLISHED SUCH RULES, IT IS BOUND BY THE SAME, WHICH, IF ALTERED, MUST BE PROSPECTIVE IN THEIR APPLICATION.

The West Virginia State Constitution, Article VIII, Section 3, is the primary source for the express authority of the West Virginia Supreme Court of Appeals to prescribe and enact administrative rules for itself and all inferior judicial tribunals of the State, which rules " . . . shall have the force and effect of law."[1] *State* v. *Davis*, 357 S.E. 2d 769 (W.Va. 1987). Cf. *Stern Brothers* v. *McClure*, 160 W.Va. 567, 236 S.E. 2d 222 (1977).

Generally, rules of court, as a necessary consequence of their having the force of law, are as binding on the issuing court as on the parties who appear before it. *Star Piano Co.* v. *Burgner*, 89 W.Va. 475, 109 S.E. 491 (1921). *Commonwealth* v. *Brown*, 395 Mass. 604, 481 N.E. 2d 469 (1985).

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[1] This Court has recognized that state court rules, regarding its bar, are sufficient to support jurisdiction under 28 U.S.C., Section 1257(2), now superceded by Section 1257(a), *supra*. See In re *Griffiths*, 413 U.S. 717 (1973).

Court rules are " . . . designed primarily to accomplish the ends of justice, protect rights, serve the convenience of litigants and implement the substantive law", in addition to, supporting and nourishing the all important and ever present predictability function of law. *Albermont* v. *Cunningham*, 186 Cal. App. 2d 84, 91 (1960). "Adherence to [court] rules promotes consistency, decreases disparate treatment and serves as a basic procedural framework for fairness." *Brown, supra* at 473.

Reduced to basic terms, requiring courts to abide by their own rules is mandated by the fundamental principle of justice that the law must deal uniformly with persons similarly situated. *Id.*

By way of contrast and comparison, the West Virginia Court has repeatedly and consistently admonished, compelled and directed lower courts and governmental bodies, exercising judicial or quasi-judicial authority, to observe their own procedural administrative rules. See, e.g., *Burgner, supra*; *State ex rel. Wilson* v. *Truby*, 167 W.Va. 179, 281 S.E. 2d 231 (1981); *Clarke* v. *West Virginia Board of Regents*, 301 S.E. 2d 618 (W.Va. 1983); *Swallop* v. *Civil Serv. Comm'n*, 304 S.E. 2d 25 (W.Va. 1983).

Of course, if a court has the initial power to formulate an administrative rule, it cannot be gainsaid that that court rule may be altered, amended or repealed. However, in accordance with the general tenets governing the effect of legislation, a rule of court should operate prospectively only, so as not to affect pending litigation. In the *Lottawanna*, 88 U.S. 558 (1874).

But should a court, for whatever commendable purpose, abrogate or circumvent its own procedural or

administrative rules, the immediate results are twofold. First, where there is no showing, or any record, that a party has properly instituted and served process, the court cannot acquire or exercise jurisdiction. *Gaymount* v. *Rice*, 135 W.Va. 785, 65 S.E. 2d 393 (1951); *State ex rel. Skinner* v. *Dostert*, 166 W.Va. 743, 278 S.E. 2d 624 (1981). Except in very limited circumstances, a court cannot assume jurisdiction *sua sponte* of a particular matter; and to attempt to do so is futile, and any orders emanating therefrom are void. *State ex rel. Preissler* v. *Dostert*, 163 W.Va. 719, 260 S.E. 2d 279 (1979). Cf. *ARHC* v. *HRC et al.*, ___ S.E. 2d ___ (No. 18197, W.Va. 1988).

Succinctly stated, the highest court in any state may prescribe, consistent with its constitutional authority, the manner in which it and its subordinate courts shall acquire and obtain jurisdiction; and compliance is essential, or proceedings therein or therebefore will be a nullity. *Duncan* v. *Tucker County Board of Education*, 149 W.Va. 285, 140 S.E. 2d 613 (1965).

The second ramification of a court's disregard of its own rules and *sua sponte* invocation of jurisdiction is that a judge or justices would be inserted into a position of a complainant who decides the merits of his own complaint, contrary to the time honored axiom that "no man may be a judge in his own case." *Preissler, supra* at 285. Thus, *sua sponte* actions by a court in aid of its jurisdiction or in violation of its own rules causes the constituent judges to stand in the shoes of all other petitioning parties; and they should recuse themselves from hearing any case in which they, by virtue of *sua sponte* measures, have become an interested party. Canon 3C (l)(d), Judicial Code of Ethics.

Intrinsic to the aforesaid State constitutional grant, by the people, of rule making power, the West Virginia Supreme Court of Appeals, as the highest judicial body, has the sole and exclusive authority to supervise and regulate the practice of law, including determinations of attorney culpability, which is accordingly recognized by the State Constitution and statutes. *State ex rel. Partain* v. *Oakley*, 227 S.E. 2d 314 (W.Va. 1976). See State Constitution, Article VIII, Section 3, and West Virginia *Code* 51-1-4a.

In regard to the case at hand, the last paragraph of Article VI, Section 4, of the West Virginia State Bar By-Laws, last approved by the West Virginia Court on December 16, 1988 (as it pertains to this case, on July 2, 1986), provides:

> In the performance of its duties under the provisions of this Article VI, the Committee on Legal Ethics shall be the *instrumentality* of the Supreme Court of Appeals for the supervision of the conduct of lawyers who are its officers. West Virginia *Code*, Court Rules, 1989, at 532. Accord: *Carey* v. *Dostert*, 294 S.E. 2d 137, 139, (W.Va. 1982). (Emphasis supplied).

Section 17 of the West Virginia State Bar By-Laws, most recently approved by the West Virginia Supreme Court of Appeals on December 15, 1988 (again, as it relates to this case, July 2, 1986), through the mandate of West Virginia *Code* 51-1-4a, provides:

> Upon completion of the formal hearing in accordance with the provisions of section fourteen of this article, the committee shall take the following action: (a) If the Hearing Panel determines

> that the case does not merit the taking of disciplinary action, it shall record its findings of fact and conclusions of law *and the case shall be dismissed*; or (b) If the Hearing Panel determines that the case merits a public reprimand or the suspension or annulment of the license of the accused, it shall organize and compose the case record with a written statement of the Hearing Panel's findings of fact, legal conclusions and recommendations as to the appropriate level of discipline, and an itemized statement of the actual and necessary expenses incurred in connection with the case. (Emphasis supplied).

The Full Hearing Panel of the Committee on Legal Ethics of the West Virginia State Bar, on October 25, 1986, adopted, as appropriate, the Findings of Fact and Conclusions of Law of the hearing Sub-Committee, thereby dismissing Legal Ethics Complaint 85-21, Count I, which decision, under Article VI, Section 17(a), hereinabove cited, and by prior practice of the West Virginia Court and the Respondent, was and is final.

Unlike Rule III, Paragraph C., Sub-Paragraph 13 and Paragraph D., of the West Virginia Rules of Procedure for the Handling of Complaints against Justices, Judges and Magistrates, which contemplates an independent evaluation of the records and recommendations of the Judicial Hearing Board in disciplinary proceedings against judicial officers; Article VI, Sections 17, 18 and 19, of the West Virginia State Bar By-Laws specifically set forth, in mandatory language, that *only* in cases where the Hearing Panel determines reprimand, suspension or annulment of the license of an accused attorney to be appropriate, shall proceedings be instituted in the Supreme Court of Appeals of West Virginia. To do otherwise, with respect

to Count I, which did not result in a finding of unethical conduct, contravenes Petitioner's Federal Constitutional rights of due process and equal protection of the laws. United States Constitution, Amendments V and XIV.

Article VI, Section 20, of the West Virginia State Bar By-Laws, which designates the procedures and ultimate Court dispositions of filed ethics actions, makes no provision for the review of dismissed ethics complaints; and therefore, taking the implication of such express exclusion, *in pari materia*, with the clear, unambiguous and unequivocal language of Sections 17, 18 and 19, the judicial delegation of authority to the Respondent Committee under Section 4, as well as, the recent adoption of said Bar By-Laws, the West Virginia Court, by its own rules, is without power, authority or jurisdiction to entertain, consider, decide, revive or act upon Count I of said Complaint against your Petitioner, heretofore dismissed by the Committee. *Smith* v. *Mississippi State Bar*, 475 So. 2d 148 (Miss. 1985). Compare *Mississippi Code 1972*, 73-3-327 and Mississippi Rules of Discipline, Rule 7(b)(i).

Essentially, Petitioner's position is: (1) that if administrative and procedural rules passed by the West Virginia Court have the "force and effect of law," then Petitioner is as entitled to the benefits, privileges and protections of those rules as he is subject to their discipline, sanction and penalties; and (2) if the West Virginia Supreme Court of Appeals declares that the inferior State courts must abide by their own rules (including those promulgated by the Supreme Court itself as applicable to lower State Courts), and that the administrative agencies shall observe their own procedural formulations, then certainly the West Virginia Supreme Court of Appeals, if

only for the sake of the hallowed predictability function of law, is obligated to follow its own approved and adopted rules for attorney discipline. *Tasker, infra.*

There is no constitutional, statutory or procedural provision authorizing an appeal from dismissal of a complaint filed against an attorney by the West Virginia State Bar Committee on Legal Ethics. Until *L.E.C.* v. *Douglas*, 370 S.E. 2d 325 (W.Va. 1988), the West Virginia Supreme Court of Appeals, in the legal history of the State, had *never* passed upon, or sought to reconsider, *sua sponte* or otherwise, an ethics complaint against one of its attorneys, which charge had theretofore been dismissed by the Committee on Legal Ethics. For the West Virginia Court to now have done so, in this one case, after the fact, is not only a flagrant disregard of its own rules, and a withdrawal of Respondent's agency, concerning disciplinary matters, but also indicative of actual judicial prejudice against your Petitioner.

Petitioner does acknowledge that the State Court has inherent power in matters going to the behavior, conduct and discipline of all lawyers in its geographical jurisdiction; but the West Virginia Court also has the authority to promulgate a rule or rules creating and reserving its review of dismissed ethics complaints, and by the precise formulation of Section 17, the West Virginia Court has not been silent on this point. Indeed, the West Virginia Court, by its own By-Law rules, has established the procedure *whereby its inherent authority is to be exercised* and under which this dismissed Count I is controlled.

In short, it would be an easy matter to make an appropriate procedural rule or By-Law inclusion. (Compare the South Carolina Disciplinary Procedure, Section 14, B.) As of this date, the West Virginia Supreme Court of Appeals has chosen not to do so.

Apparently the West Virginia Court has abrogated the established, approved and heretofore practiced provisions of Article VI, Section 17, 18 and 19, in favor of an unprecedented special rule, for the benefit of your Petitioner only in a *pending* case; or, more bluntly put, the West Virginia Court has ignored Sections 17, 18 and 19, and "changed the rules in the middle of the game" in order to super-impose their notion of a preferred and retroactive result. *Douglas, supra* at 334-336. *Contra,* In the *Lottawanna, supra.*

Moreover, the West Virginia Court's *sua sponte* action in *Douglas,* on the dismissed ethics charge, notwithstanding the specific and heretofore practiced procedure of Article VI, Sections 17, 18, 19 and 20; its factual determination of attorney misconduct as a matter of law; its direction to the Hearing Panel to reverse its initial verdict of dismissal and find a violation of a specific Disciplinary Rule; and its subsequent assumption herein of its administrative/judicial role in attorney discipline, places the West Virginia tribunal in the unique position of having been complainant, prosecutor, jury and now judge in this cause below, which independent and unsolicited acts not only offend fundamental notions of fairness, consistency, and *stare decisis,* but also, make the West Virginia Court a party, and thus, disqualified to preside over this litigation at the state level. See *Preissler, supra* at 285 and Canon 3C(l)(d), Judicial Code of Ethics. Finally, twenty-two

years ago, the West Virginia Court established by clear, non-dicta precedent, the controlling nature of the compulsory clauses of the West Virginia State Bar By-Laws. In re *Mann*, 151 W.Va. 644, 154 S.E. 2d 860 (1967).

The attorney in *Mann* had been convicted in Federal Court of a felony involving tax evasion, and subsequent thereto, the West Virginia Legal Ethics Committee filed a complaint in the West Virginia Supreme Court of Appeals praying for the annulment of the lawyer's license by the obligatory terms of Article VI, Section 23 of the State Bar By-Laws, which dealt with crimes of moral turpitude. The Attorney resisted annulment and advocated suspension, citing hardships. The West Virginia Court said at page 652:

> Section 23. [Article VI, State Bar By-Laws], provides in clear and unmistakable language that any court before which any attorney has been qualified, upon proof that he has been convicted of any crime involving moral turpitude *'shall**** annul his license to practice law.' That language is not only clear in its meaning, but also mandatory in its command. The general rule is that the word *'shall'*, when used in connection with a duty imposed, must be construed as mandatory and excludes the idea of discretion. (citations omitted.) If, therefore, it is determined that the offense of which Fletcher W. Mann stands convicted is one involving moral turpitude, our duty to annul his license is mandatory, and there is no room for an exercise of a discretion based on facts which are alleged to constitute extenuating circumstances. (Emphasis supplied).

Thus, the inherent authority of the *Mann* Court was not invoked or even considered to nullify the "shall"

language of Section 23; and by necessary comparison, it was incumbent upon the West Virginia Court to give proper effect to the "shall" subparagraph of Section 17(a) of those same By-Laws. See also *L.E.C.* v. *Anderson*, ___ S.E. 2d ___ (No. 18804, W.Va. 1989).

In brief, the West Virginia Court in *Mann* recognized and confirmed that the mandatory provision of Article VI, Section 23 of the State Bar By-Laws was binding upon them. Why then was the mandatory provision of Section 17(a) treated differently in this case below?

One line of reasoning by the West Virginia Court, in holding an administrative entity to its own procedural rules, is especially inspiring and worthy of concluding quote:

> An administrative board must abide by its own rules and the legislative mandates. Of course, this is basic to due process notice. The notice element of due process requires that those affected by rules of an administrative board be entitled to depend on use by and adherence to those rules by the board; otherwise, any person relying on rules which are not followed is misled and surprised, making this facet of notice a sham. *Tasker* v. *Mohn*, 165 W.Va. 55, 267 S.E. 2d 183 (1980).

III

THE PRIVILEGE AGAINST DOUBLE JEOPARDY, CONTAINED IN THE FIFTH AMENDMENT AND APPLIED TO THE VARIOUS STATES THROUGH THE FOURTEENTH AMENDMENT, AND ARTICLE VI, SECTION 17(a) OF THE WEST VIRGINIA STATE BAR BY-LAWS, PRECLUDE AN ATTORNEY FROM BEING DISCIPLINED ON THE SAME ETHICS CHARGE, FOR WHICH HE FORMERLY HAD BEEN ACQUITTED.

Since the extreme result of attorney disciplinary proceedings can deprive an attorney of the right to earn a

living, analogies to criminal law have been implied, so that such litigation has been deemed to be "quasi-criminal" in nature. In re *Ruffalo, supra.* See also *Florida Bar* v. *Rubin,* 362 So. 2d 12 (Fla. 1978); *State Bar of Texas* v. *Heard,* 603 S.W. 2d 829 (Tex. 1980); *Razatos* v. *Colorado Supreme Court,* 746 F. 2d 1429 (Colo C.A. 10) (1984).

In addition, the Fifth Amendment clause pertaining to self-incrimination, as applied to the various states through the Fourteenth Amendment, has been extended to lawyers by barring the imposition of penalties for remaining silent in a disciplinary proceeding. *Spevak* v. *Klein,* 384 U.S. 511 (1967). Logic would then dictate, that to the extent of Federal Constitutional protections, that that other well known clause of the Fifth Amendment; namely, the double jeopardy provision, would also be available to lawyers, through the Fourteenth Amendment, where, as here, an attorney's livelihood in duplicate disciplinary causes, between the same parties, on the same issue, by the same evidence, and with the same burden of proof, has been placed twice in danger of divestiture.

Of more than probative value is the fact that the original Hearing Panel on remand refused the directions of the West Virginia Court to rescind its dismissal of 85-21 and re-issue a finding of misconduct. Section 17(a) is clear in meaning, and should have been applied unconditionally in this case below.

CONCLUSION

For the reasons given and upon the authority cited, this Court should grant Certiorari.

Respectfully submitted,

/s/ James Wilson Douglas
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and Counsel of Record

APPENDIX A

BEFORE THE COMMITTEE ON LEGAL ETHICS
OF THE
WEST VIRGINIA STATE BAR

IN RE: JAMES W. DOUGLAS, a member of
The West Virginia State Bar

L.E.C. 85-21, 86-03,
86-04, 86-05

FULL HEARING PANEL FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION CONCERNING DISCIPLINE

This matter came on for deliberation by the Full Hearing Panel of the Committee on Legal Ethics of The West Virginia State Bar at its meeting held on October 25, 1986 in Morgantown, West Virginia. After review of the Subcommittee Report submitted by the Hearing Subcommittee which had been assigned to the hearing of the matter, the Hearing Panel entered upon deliberations of the matter, and, after consideration of the record in the Subcommittee Report, voted unanimously, a quorum being present, to make the following Findings of Fact, Conclusions of Law, and Recommendation Concerning Discipline:

COUNT I – L.E.C. 85-21

After due consideration of the Findings of Fact and Conclusions of Law listed on page 2 of the Hearing Subcommittee Report, the Full Hearing Panel determined that said Findings of Fact and Conclusions of Law were

appropriate in this matter and voted to adopt said Findings of Fact and Conclusions of Law as those of the Full Hearing Panel of the Committee on Legal Ethics, thereby dismissing Count I of the Complaint and Statement of Charges.

COUNT II – L.E.C. 86-03

After due consideration of the Findings of Fact and Conclusions of Law listed on page 2 and 3 of the Hearing Subcommittee Report, the Full Hearing Panel determined that said Findings of Fact and Conclusions of Law were appropriate in this matter and voted to adopt said Findings of Fact and Conclusions of Law as those of the Full Hearing Panel of the Committee on Legal Ethics, thereby dismissing Count II of the Complaint and Statement of Charges.

COUNT III – L.E.C. 86-04

FINDINGS OF FACT

The Hearing Panel has carefully reviewed the outline of evidence presented to the Hearing Subcommittee as found on pages 3, 4 and 5 of the Hearing Subcommittee Report signed by the members of the Hearing Subcommittee. After review of that brief of the evidence and discussion of the matter, the Full Hearing Panel further determined that the six Findings of Fact and their subparts with regard to the allegations against Attorney James Wilson Douglas in L.E.C. 86-04 as setforth (sic) on pages 3, 4 and 5 of the Hearing Subcommittee Report are supported by a full and clear preponderence (sic) of the evidence

and are adopted as Findings of Fact by the Full Hearing Panel of the Committee on Legal Ethics.

CONCLUSIONS OF LAW

After due consideration of the foregoing Findings of Fact the Full Hearing Panel of the Committee on Legal Ethics determined that the Conclusions of Law listed on page 5 of the Hearing Subcommittee Report were appropriate in this matter and voted to adopt the Conclusions of Law recited in the Hearing Subcommittee Report as those of the Full Hearing Panel of the Committee on Legal Ethics.

RECOMMENDATION OF DISCIPLINE

After due consideration of the Findings of Fact, the Conclusions of Law and the Recommendation of Discipline, as contained on page (sic) 5 and 6 of the Hearing Subcommittee Report, the full Hearing Panel determined that it will present a formal recommendation to the Supreme Court of Appeals of the State of West Virginia that the license of the Respondent James Wilson Douglas to practice law in the State of West Virginia be suspended for a period of six months and that he be required to pay the costs incident to the investigation and prosecution of this count.

COUNT IV – L.E.C. 86-05

After due consideration of the Findings of Fact and Conclusions of Law listed on page 6 of the Hearing Subcommittee Report, the Full Hearing Panel determined

that said Findings of Fact and Conclusions of Law were appropriate in this matter and voted to adopt said Findings of Fact and Conclusions of Law as those of the Full Hearing Panel of the Committee on Legal Ethics, thereby dismissing Count IV of the Complaint and Statement of Charges.

COUNT V

After due consideration of the Findings of Fact and Conclusions of Law listed on page 6 and 7 of the Hearing Subcommittee Report, the Full Hearing Panel determined that said Findings of Fact and Conclusions of Law were appropriate in this matter and voted to adopt said Findings of Fact and Conclusions of Law as those of the Full Hearing Panel of the Committee on Legal Ethics, thereby dismissing Count V of the Complaint and Statement of Charges.

HEARING PANEL
COMMITTEE ON LEGAL
ETHICS OF THE WEST
VIRGINIA STATE BAR

/s/ Erwin L. Conrad
Erwin L. Conrad,
Chairman

[Entered October 25, 1986]

BEFORE THE COMMITTEE ON LEGAL ETHICS
OF THE WEST VIRGINIA STATE BAR

IN RE: JAMES W. DOUGLAS, a member of the West Virginia State Bar,

Respondent.

L.E.C. 85-21, 86-03
86-04, 86-05

SUBCOMMITTEE REPORT

The matter is before a Hearing Subcommittee upon a statement of charges filed by the Committee on Legal Ethics of the West Virginia State Bar against James W. Douglas, herein "Respondent."

The hearing upon the statement of charges was conducted on August 18, 19, 1986 and September 15, 16, 1986, before a Subcommittee composed of Arthur M. Recht, Chairman, Diana Everett, and John J. Paull.

The written notice containing a plain statement of the charges against the Respondent was served and executed in accordance with Article VI, Section 14, 39 of the West Virginia State Bar By-Laws.

The Committee on Legal Ethics of the West Virginia State Bar filed a five (5) count statement of charges. Upon the Respondent's motion to sever these counts, each was considered separately. This Subcommittee Report will address each of the counts with a separate findings of fact and conclusions of law and recommendations where warranted.

The following constitutes the Subcommittee Report containing a statement of the findings of fact, conclusions of law, and recommendation as to the warranted disciplinary procedure in accordance with Article VI, Section 17(c) of the West Virginia State Bar By-Laws.

FINDINGS OF FACT

COUNT I

The Subcommittee finds that the Committee on Legal Ethics of the West Virginia State Bar has failed to meet its burden of proving the charges in Count I of the Statement of Charges by full, clear and preponderating evidence.

CONCLUSIONS OF LAW

Count I of the Complaint and Statement of Charges filed against the Respondent should be dismissed. See *Committee on Legal Ethics v. Daniel*, 160 W.Va. 388, 235 S.E. 2d 369 (1977); *Committee on Legal Ethics v. Higginbotham*, ___ W.Va. ___, 342 S.E. 2d 152 (1986).

COUNT III

FINDINGS OF FACT

The Subcommittee finds that the Committee on Legal Ethics of the West Virginia State Bar has failed to meet its burden of proving the charges in Count II of the Statement of Charges by full, clear and preponderating evidence.

CONCLUSIONS OF LAW

Count II of the Complaint and Statement of Charges filed against the Respondent should be dismissed. See *Committee on Legal Ethics v. Daniel*, 160 W.Va. 388, 235 S.E. 2d 369 (1977); *Committee on Legal Ethics v. Higginbotham*, ___ W.Va. ___, 342 S.E. 2d 152 (1986).

COUNT III

FINDINGS OF FACT

(1) Respondent is a licensed member of the West Virginia State Bar.

(2) The venue of these proceedings was held in the county in which the Respondent resides in accordance with Article VI, [Section] 14 of the West Virginia State Bar By-Laws and the challenge to the composition of the Subcommittee and in particular the Chairman was previously denied as being without merit.

(3) That by Order of the Circuit Court of Braxton County on August 10, 1986, the Respondent, among others, were restrained from publicly commenting upon an investigation by a Special Commissioner of the Circuit Court of Braxton County relating to certain real estate transactions.

(4) That the Respondent, in defiance of the Order of the Circuit Court of Braxton County, publicly commented upon the matter pending before the Circuit Court of Braxton County whose comments appeared in the September 6, 1985 edition of the "Braxton Democrat Central."

(4) That the Respondent's comments as directly quoted and admitted by the Respondent and published in the "Braxton Democrat Central" constituted a willful, wrongful and deliberate attempt to usurp and undermine the authority of the Judges of the Circuit Court of Braxton County and interferred with and did otherwise prejudice the administration of justice in the Circuit Court of Braxton County.

(5) That the method and manner of the Respondent's expression regarding the Order of the Circuit Court of Braxton County went beyond proper comment and free expression and did expose the Circuit Court of Braxton County to ridicule and scorn, all of which constitutes conduct that is prejudicial to the administration of justice.

(6) That the following comments by the Respondent are representative of the opprobrious remarks which constitutes conduct which is prejudicial to the administration of justice:

> "I have much disdain and contempt for the gag order."
>
> "I think this whole sorted (sic) affair is nothing but a farce (sic) and a thinly disguised attempt at 'power jockeying' . . . "
>
> "I am thoroughly convinced that neither Judge gives a hoot or hollar about Mr. Greenlief and that they are perfectly willing to sacrifice his right to privacy, his *piece* (sic) of mind, and all notions of fundamental fairness on the pagan altar of political expediency."
>
> "I can't help but compare these two Judges to Justice Neely who in the summer received a lot of publicity about the way he regarded his

employees as personal servants. It appears to me that in that comparison our two Judges think that through the device of, or upon the basis of 'officers of the Court' they can treat their lawyers and magistrates like slaves.

In essence, the whole matter is indicative, including Neely, of probably the nationwide trend that people are beginning to speak out against Judges. They are no longer regarded as provincial dieties. It would appear to me from this whole affair that the Salem witch trials of the 17th century England are still with us.

As far as I am concerned, the Judges drew first blood. If a battle is inevitable, then I will rise to the challenge."

CONCLUSIONS OF LAW

That a lawyer who in violation of an Order of a Court publicly disgraces and contemptuously scorns both the Order and the Court, undermines the judicial process in such a manner that such conduct is prejudicial to the administration of justice in violation of DR 1-102(A)(5) which provides that a lawyer shall not:

"(5) Engage in conduct that is prejudicial to the administration of justice."

RECOMMENDATION

The Respondent expresses no contrition or offers any mitigating circumstances excusing or explaining his conduct of publicly scorning and ridiculing the Judges of the Circuit Court of Braxton County.

There must be some recognition of the delicate balance between the right of a lawyer to freely express his

opinions and conduct which is considered to be prejudicial to the administration of justice.

The Respondent crossed the threshhold (sic) beyond which his expression could in any way be considered protected when he unleashed his verbal, abusive attack upon the Circuit Court of Braxton County. This conduct cannot be condoned. Accordingly, the Subcommittee recommends that the Respondent's license to practice law in the State of West Virginia be suspended for a period of six (6) months.

COUNT IV

FINDINGS OF FACT

The Subcommittee finds that the Committee on Legal Ethics of the West Virginia Bar has failed to meet its burden of proving the charges in Count IV of the Statement of Charges by full, clear and preponderating evidence.

CONCLUSIONS OF LAW

Count IV of the Complaint and Statement of Charges filed against the Respondent should be dismissed. See *Committee on Legal Ethics v. Daniel,* 160 W.Va. 388, 235 S.E. 2d 369 (1977); *Committee on Legal Ethics v. Higginbotham,* ___ W.Va. ___, 342 S.E. 2d 152 (1986).

COUNT V

FINDINGS OF FACT

The Subcommittee finds that the Committee on Legal Ethics of the West Virginia State Bar has failed to meet

its burden of proving the charges in Count V of the Statement of Charges by full, clear and preponderating evidence.

CONCLUSIONS OF LAW

Count V of the Complaint and Statement of Charges filed against the Respondent should be dismissed. See *Committee on Legal Ethics v. Daniel*, 160 W.Va. 388, 235 S.E. 2d 369 (1977); *Committee on Legal Ethics v. Higginbotham*, ___ W.Va. ___, 342 S.E. 2d 152 (1986).

/s/ Arthur M. Recht
Arthur M. Recht,
Chairman

/s/ Diana Everett
Diana Everett, Member

/s/ John J. Paull
John J. Paull, Member

[Entered October 25, 1986]

APPENDIX B

BEFORE THE COMMITTEE ON LEGAL ETHICS
OF THE
WEST VIRGINIA STATE BAR

IN RE: JAMES W. DOUGLAS, I.D. #86-04
a member of The West Virginia State Bar

FULL HEARING PANEL FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION CONCERNING DISCIPLINE

This matter came on for deliberation by the Full Hearing Panel of the Committee on Legal Ethics of The West Virginia State Bar at its meeting held on February 25, 1989, in Charleston, West Virginia. After review of the Subcommittee Report submitted by the Hearing Subcommittee which had been assigned to the hearing of the matter, the Hearing Panel entered upon deliberations of the matter and, after consideration of the record in the Subcommittee Report, voted unanimously, a quorum being present, to make the following Findings of Fact, Conclusions of Law, and Recommendation Concerning Discipline:

FINDINGS OF FACT

The Hearing Panel has carefully reviewed the discussion presented by the Hearing Subcommittee Report signed by the members of the Hearing Subcommittee. After review of the evidence and discussion of the matter, the Full Hearing Panel further determined that the eleven Findings of Fact with regard to the allegations against Attorney James Wilson Douglas in I.D. 86-04 (sic: 85-21)

as set forth on pages 3 through 6 of the Hearing Subcommittee Report are supported by full and clear preponderance of the evidence and are adopted as Findings of Fact by the Full Hearing Panel of the Committee on Legal Ethics.

CONCLUSIONS OF LAW

After due consideration of the foregoing Findings of Fact, the Full Hearing Panel of the Committee on Legal Ethics determined that the Conclusions of Law listed on page 6 of the Hearing Subcommittee Report were appropriate in this matter and voted to adopt the Conclusions of Law recited in the Hearing Subcommittee Report as those of the Full Hearing Panel of the Committee on Legal Ethics.

RECOMMENDATION OF DISCIPLINE

After due deliberation of the Findings of Fact, the Conclusions of Law and the Recommendation of Discipline, as contained on page 6 of the Hearing Subcommittee Report, the Full Hearing Panel determined that it will present a formal recommendation to the Supreme Court of Appeals of the State of West Virginia that Respondent James W. Douglas be suspended from the practice of law for a period of six (6) months by the Supreme Court of Appeals and that he be required to pay the costs incident to the investigation and prosecution of this matter.

HEARING PANEL,
COMMITTEE ON LEGAL
ETHICS OF THE WEST
VIRGINIA STATE BAR

/s/ Arthur M. Recht
Arthur M. Recht, Chairman

DATE: February 28, 1989

[Entered on February 28, 1989]

BEFORE THE COMMITTEE ON LEGAL ETHICS
OF THE WEST VIRGINIA STATE BAR

IN RE: JAMES W. DOUGLAS, a member of the West Virginia State Bar, L.E.C. ID #86-04

Respondent

This matter is before a new hearing sub-committee composed of W.A. Thornhill III, Chairman, John Skinner, Jr. and David Harris upon Count I (and relating to the so-called "stud fee" case) filed by the Committee on Legal Ethics of the West Virginia State Bar against James W. Douglas.

The original hearing upon the statement of charges was conducted on August 18 and 19, 1986, and September 15 and 16, 1986, before a sub-committee composed of Arthur M. Recht, Chairman, Diana Everett and John J. Paull. That sub-committee made a report to the full hearing panel on said Count I stating that the Committee on Legal Ethics of the West Virginia State Bar had failed to meet its burden of proving its charges in that count by full, clear and preponderating evidence. The full committee adopted the report and thereby dismissed Count I of the complaint and statement of charges.

The recommendation of the original sub-committee to the full panel on another count, namely, Count III, was that the Respondent be found guilty of conduct which was prejudicial to the administration of justice and had thereby undermined the judicial process in violation of Dr (sic) 1-102 (a)(5). On that basis the full panel recommended to the West Virginia Supreme Court of Appeals that the license of the Respondent, James W. Douglas, to practice law in the State of West Virginia be suspended for a period of six months.

Thereafter the West Virginia Supreme Court of Appeals in Committee on Legal Ethics v. Douglas, ___ W.Va. ___, 370 S.E.2d 325 (1988) remanded the case to the Hearing Panel on Counts I and III. The Court held that as to Count III, First Amendment protections were involved and that further development of the facts on remand would be necessary before discipline could be imposed. On Count I, the Court held that the Hearing Panel had misperceived the nature of attorney responsibility under DR 7-102(a)(1) and 7-102(A)(2), and had therefore dismissed the charges in that count. The remand on Count I was for the Hearing Panel, as the finder of fact, to determine whether the "stud fee case" was "unwarranted" under the law, whether the Respondent was aware that the claim was unwarranted and whether there was an improper motive on his part in doing so.

The Hearing Panel on remand determined that the committee should not proceed further on Count III but that a new sub-committee should be appointed to consider Count I. In the process of this being done, both the State Bar and the Respondent were asked whether they

wished to present further evidence on Count I and both declined to do so.

The Supreme Court in Committee on Legal Ethics v. Douglas, supra, stated that the issues involved in Count I would more appropriately be explored in the first instance by the Hearing Panel as a finder of fact. Although the Court stated the record could be supplemented on remand, the sub-committee having determined that no additional hearing or evidence are necessary doth therefore make the following statement of the findings of fact, conclusions of law and recommendation as to the warranted disciplinary procedure in accordance with Article VI, Section 17(c) of the West Virginia State Bar bylaws.

FINDINGS OF FACT

1. Respondent is a licensed member of the West Virginia State Bar.

2. These proceedings were held in the county in which the Respondent resides in accordance with Article VI, Section 14 of the West Virginia State Bar bylaws.

3. In the month of December, 1982, a young man in his 20's who was a native of Clay County, named Ricky DeWayne Morris, went to a party of other young people where he met a young woman named Ida Jane Steele (also in her 20's) who was a school teacher and not a native of that area, both of said young people being single. Both consumed an indeterminate amount of beer on that occasion and after being at the party for several hours the two of them left and went to Miss Steele's

apartment where they mutually agreed with very little comment on the subject to go to bed together. They did have sexual relations.

4. Ida Jane Steele and Ricky DeWayne Morris did not see each other again for approximately two months, at which time Miss Steele confronted Mr. Morris with the fact that she was pregnant and that he was responsible for her condition. He agreed to give her some financial assistance and actually did give her the sum of $65.00 to help her buy some maternity dresses.

5. Thereafter, but before the birth of the child, Miss Steele sought to have Mr. Morris go to the Prosecuting Attorney's office to sign papers admitting he was the father of her child, and upon his failure to do so, and following the birth of the child, paternity proceedings were filed against him.

6. Mr. Morris then went to the Respondent and employed him as his attorney and the Respondent filed a written answer to the paternity proceeding wherein several defenses were asserted, some of them on the face being inconsistent with each other.

7. Upon the request of the State a blood test was made of the mother, the child, and Mr. Morris and the results indicated that the probabilities of Mr. Morris being the father of the child ("Katy") who was born on August 30, 1983, was 99.5%.

8. Respondent then filed on August 17, 1984, in the Circuit Court of Clay County an action in behalf of Ricky DeWayne Morris against Ida Jane Steele (Civil Action No. 84-C-120) having one count in it in which the claim was

made that Miss Steele had contracted with Mr. Morris to provide so-called "stud services" to her.

9. The facts which Ricky DeWayne Morris had related to the Respondent, both according to the testimony of Mr. Morris and the Respondent, failed to support many of the allegations in the complaint against Miss Steele relating to the "stud fee."

10. Almost immediately upon the filing of the "stud fee" suit Miss Steele resigned from the school system and moved away from town.

11. In early December, 1984, Ricky DeWayne Morris signed an acknowledgment of his duty to support Miss Steele's infant child and later that same month the "stud fee" case was dismissed with prejudice.

CONCLUSIONS OF LAW

1. The so-called "stud fee" suit was frivolous in that it was unwarranted under the law.

2. The filing of the frivolous suit was a knowing violation on the part of the Respondent in that the suit was unwarranted on the facts as the Respondent knew them.

3. In accordance with the finding of the Supreme Court of Appeals, the record reveals an utter lack in basis of fact for the suit and does, in fact, show an improper motivation on the part of the Respondent.

RECOMMENDATION

The sub-committee recommends that the Respondent's license to practice law in the State of West Virginia be suspended for a period of 6 months.

/s/ W.A. Thornhill III

/s/ David Harris

/s/ John Skinner Jr.

[Entered February 28, 1989]

APPENDIX C

[IN THE WEST VIRGINIA SUPREME COURT OF APPEALS]

Per Curiam:

Committee on Legal Ethics of the
West Virginia State Bar

No. 19008 vs.

James Wilson Douglas

This is an attorney disciplinary proceeding commenced by the Committee on Legal Ethics against James Wilson Douglas. The Committee found that Douglas violated DR 7-102(A)(1) and (2) by knowingly filing a frivolous and vexatious lawsuit. The Committee recommends a six-month suspension from the practice of law, and the assessment of costs associated with the proceedings regarding this charge. We adopt the findings and recommendations of the Committee.

The facts of this case appear fully in part II of our opinion in *Committee on Legal Ethics v. Douglas*, ___ W. Va. ___, ___, 370 S.E.2d 325, 333 (1988). In that case we remanded two ethics violation charges to the Committee for further consideration. The Committee chose not to pursue one count, however, at our direction, reconsidered the previously dismissed "stud fee" case under DR 7-102(A)(1) and (2). Neither party sought to supplement the record on the matter; therefore, those facts contained in *Douglas*, ___ W. Va. at ___, 370 S.E.2d at 333, were presented to a newly appointed hearing subcommittee.

The hearing subcommittee presented its report, which was adopted by the full hearing panel. The Committee found that Douglas knew or should have known

"that the purpose of his conduct [was] to harass or injure another." In support of its conclusion that Douglas subjectively and objectively violated the rule in filing the frivolous lawsuit, the Committee found that Douglas "filed the 'stud fee' suit without sufficient information to support its allegations; the paternity action against his client was still pending; the parties lived in a small, rural town, where [the mother] taught school."

As a result of its finding that Douglas filed a frivolous lawsuit, the Legal Ethics Committee asks this Court to suspend his license to practice for six months and assess him with the costs associated with the disciplinary procedures invoked to prosecute this charge.

" 'Absent a showing of some mistake of law or arbitrary assessment of the facts, recommendations made by the State Bar Legal Ethics Committee . . . are to be given substantial consideration.' Syllabus Point 3, in part, *In Re Brown*, ___ W. Va. ___, 273 S.E.2d 567 (1980)." Syl. pt. 2, *Committee on Legal Ethics v. White*, ___ W. Va. ___, 349 S.E.2d 919 (1986).

In syllabus point 1 of *Committee on Legal Ethics v. Lilly*, ___ W. Va. ___, 328 S.E.2d 695 (1985), we noted that when an attorney presents mitigating facts and circumstances surrounding allegations of an ethics violation, the Court will take these factors into consideration when determining the appropriate disciplinary sanction.

In his brief in response to the Committee's recommendation, Douglas offers no defense to the substantive matters currently before the Court, but instead readdresses certain procedural issues previously considered by the Court in syllabus point 3 of *Committee on Legal*

Ethics v. Douglas, ___ W. Va. ___, 370 S.E.2d 325 (1988), *petition for rehearing denied*, May 18, 1988; second motion to recuse the members of this Court denied March 23, 1989. Therefore, we decline to address his contentions in regard to those issues.

As noted in syllabus point 4 of *Douglas, supra*, a violation of DR 7-102(A)(1) and (2) may, in certain circumstances, result in disbarment. We, therefore, adopt the findings and recommendations of the Committee as the Committee's findings are fully supported by the record and no mitigating factors for determining the appropriate disciplinary sanction were presented.

Accordingly, it is Adjudged and Ordered that the recommendation of the Committee on Legal Ethics is adopted and the attorney's license to practice law is suspended for six months and the attorney is assessed with the costs associated with the proceedings regarding this charge.

[Entered July 14, 1989]

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the *20th* day of *July, 1989*, the following order was made and entered:

Committee on Legal Ethics of the
West Virginia State Bar,
Complainant

vs.) No. 19008

James W. Douglas, a member of
the West Virginia State Bar,
Respondent

The Court having maturely considered the petition for rehearing and reargument filed in the above-captioned case, is of opinion to, and doth hereby deny the prayer of the petitioner and doth order that the final order entered herein be made absolute and certified as heretofore directed.

A True Copy

Attest: /s/ Ancil G. Ramey
Clerk, Supreme Court
of Appeals

APPENDIX D

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

At Charleston

COMMITTEE ON LEGAL
ETHICS OF THE WEST
VIRGINIA STATE BAR,

Complainant

VS. No._____
DISCIPLINARY PROCEEDINGS
(L.E.C. Docket No. 86-04)

JAMES W. DOUGLAS, a
member of the West
Virginia State Bar,

Respondent.

MOTION TO STRIKE

Comes now the Respondent, James Wilson Douglas, *pro se*, and moves this Honorable Court to strike all those allegations of Complainant's Complaint, together with the pertinent parts of the official transcript, and corresponding documentary exhibits, which allude to, deal with, or make mention of any dismissed Counts or Legal Ethics Complaints, heretofore unsuccessfully prosecuted against the Respondent, or such matters that otherwise treat or refer to events or circumstances which are extraneous to the non-dismissed portion of Legal Ethics Complaint 86-04, and Respondent does assign as his grounds, in support thereof, the following:

1. That the last paragraph of Article VI, Section 4 of the West Virginia State Bar By-Laws provides:

> In the performance of its duties under the provisions of this Article VI, the Committee on Legal Ethics shall be the instrumentality of the Supreme Court of Appeals for the supervision of the conduct of lawyers who are its officers. West Virginia *Code*, Court Rules, 1987, at 464. Accord: *Carey* vs. *Dostert*, 294 S.E. 2d 137, 139, (W.Va. 1982).

2. That the Full Hearing Panel of the Committee on Legal Ethics of the West Virginia State Bar, on October 25, 1986, adopted, as appropriate, the Findings of Fact and Conclusions of Law of the Hearing Sub-Committee, thereby dismissing Legal Ethics Complaints 85-21, 86-03, 86-05, and Count V of the Statement of Charges, and approximately one-half of Legal Ethics Complaint 86-04, which decision, under Article VI, Section 17(a) and by prior practice of this Court, is final.

3. That *unlike* Rule III, Paragraph C., Sub-Paragraph 13 and Paragraph D., of the Rules of Procedure for the Handling of Complaints against Justices, Judges and Magistrates, which contemplate an independant evaluation of the records and recommendations of the Judicial Hearing Board in disciplinary proceedings against judicial officers; forth, in mandatory language, that *only* in cases where the Hearing Panel determines reprimand, suspension or annulment of the license of an accused attorney to be appropriate, shall proceedings be instituted in the Supreme Court of Appeals of West Virginia. To do otherwise, with respect to those Counts which did not result in a finding of unethical conduct, contravenes Respondent's Federal Constitutional rights of due process and equal protection of the law, which guarantees

Respondent hereby invokes. United States Constitution, Amendment XIV.

4. That Bar Counsels' inclusion of references, records, pleadings, transcripts, exhibits and material intrinsic or relative to the aforementioned dismissed Legal Ethics Complaints or Counts, not only violates those Sections of the Bar By-Laws upon which this case is purportedly promulgated, but also evinces a clear abuse or excessive use of their authority.

Moreover, Bar Counsel's *intention* to circumvent or disregard the unequivocal directives of Article VI, Section 17 (a) is made manifest by Paragraph 16, Sub-Paragraph A, sentence two of their Complaint, which begins: "Although the Committee ordinarily would not submit the exhibits and transcripts of those Counts which did not result in a finding of unethical conduct . . . " at 10.

In essence, Respondent would contend that Bar Counsel have abrogated the established, approved and heretofore practiced provisions of Article VI, Section 17, 18 and 19, in favor of an unprecedented "special rule", for the benefit of your Respondent only, due to the pendency of a Petition for Writ of Prohibition in the unrelated criminal case of *Westfall*, et al., vs. *Douglas*, et al.

5. That taken in the light of the above-quoted Allegation 16. of Complainant's Complaint, Respondent would further maintain that the present Complaint's formulation and submission of materials connected with the said dismissed Counts, is an overt and naked attempt by Bar Counsel to prejudice this Court against the Respondent in evaluation and decision of that segment of Legal

Ethic Complaint 86-04, upon which the Committee has made a recommendation of disciplinary action;

And Respondent would assign as motives therefor:

(a) Prosecutorial vindictiveness for the Bar and Committee having not initially prevailed on the unproven Ethical Complaints against your Respondent;

(b) Adverse media reaction to such failure;

(c) Apprehensiveness that the Bar Counsel and Committee will not gain ascendancy before this Court on the remaining issue of discipline in Legal Ethics Complaint 86-04;

(d) Desire to justify, if not recoup, the financial expenditures of the Bar incurred in the aforesaid unsuccessful ethical charge, an itemization of which is obliquely interjected, in Exhibit form, as an implied element for consideration in the residual aspects of Legal Ethics Complaint 86-04.

6. For such other reasons as may appear on the hearing of this Motion.

/s/ James Wilson Douglas
JAMES WILSON DOUGLAS
pro se

[Entered March 27, 1987]

APPENDIX E

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

AT CHARLESTON

COMMITTEE ON LEGAL ETHICS
OF THE WEST VIRGINIA STATE BAR,

Complainant,

vs. No._____
DISCIPLINARY PROCEEDINGS
(L.E.C. Docket No. *86-04*)

JAMES WILSON DOUGLAS, a
member of the West Virginia State Bar,

Respondent.

REPLY TO RULE TO SHOW CAUSE AND OBJECTIONS TO SECOND COMPLAINT

Comes now the Respondent, James Wilson Douglas, *pro se*, appearing SPECIALLY, pursuant to Section 17(a) and (b) and Section 20 of Article VI of the West Virginia State Bar By-Laws, and makes his Reply to this Court's Rule to Show Cause, heretofore awarded in this action, and Objects to the Complainant's Second Complaint, thereby filed herein upon an action heretofore dismissed by the Legal Ethics Committee on or about October 25, 1986, and Respondent does assign as his grounds, in support thereof, the following:

A. That under Article VIII, Section 3 of the West Virginia State Constitution, rules promulgated by the Supreme Court of Appeals " . . . shall have the force and effect of law."

B. That the last paragraph of Article VI, Section 4, of the West Virginia State Bar By-Laws, last approved by this Court on December 15, 1988 (as it pertains to this case, on July 2, 1986), provides:

> In the performance of its duties under the provisions of this Article VI the committee on legal ethics shall be the instrumentality of the supreme court of appeals for the supervision of the conduct of lawyers who are its officers. West Virginia *Code*, Court Rules, 1989, at 532.

C. That Section 17 of the West Virginia State Bar By-Laws, most recently approved by this Court on December 15, 1988 (again, as it relates to this case, July 2, 1986), through the mandate of West Virginia Code 51-1-4a, provides:

> Upon completion of the formal hearing in accordance with the provisions of section fourteen of this article, the committee shall take the following action:
>
> (a) If the Hearing Panel determines that the case does not merit the taking of disciplinary action, it shall record its findings of fact and conclusions of law and *the case shall be dismissed;* (Emphasis supplied.)

D. That the Full Hearing Panel of the Committee on Legal Ethics of the West Virginia State Bar, on October 25, 1986, adopted, as appropriate, the Findings of Fact and Conclusions of Law of the Hearing Sub-Committee, thereby dismissing Legal Ethics Complaint 85-21, Count I, which decision, under Article VI, Section 17(a), hereinabove cited, and by prior practice of this Court and the Complainant, is final.

E. That *unlike* Rule III,Paragraph C., Sub-Paragraph 13 and Paragraph D., of the Rules of Procedure for the Handling of Complaints against Justices, Judges and Magistrates, which contemplate an independent evaluation of the records and recommendations of the Judicial Hearing Board in disciplinary proceedings against judicial officers; Article VI, Sections 17, 18, 19 and 20, of the State Bar By-Laws specifically set forth, in mandatory language, that *only* in cases where the Hearing Panel determines reprimand, suspension or annulment of the license of an accused attorney to be appropriate, shall proceedings be instituted in the Supreme Court of Appeals of West Virginia. *Inclusio unius est exclusio alterius*. To do otherwise, with respect to Count I which did not result in a finding of unethical conduct, contravenes Respondent's Federal Constitutional rights of due process and equal protection of the laws, which guarantees Respondent hereby invokes. United States Constitution, Amendments V and XIV.

F. That Section 20, Article VI, of the State Bar By-Laws, which designates the procedures and ultimate Court dispositions of filed ethics actions, makes no provision for the review of dismissed ethics complaints; and therefore, taking the implication of such express exclusion, *in pari materia*, with the clear, unambiguous and unequivocal language of Section 17, the judicial delegation of authority to the Complainant Committee under Section 4, as well as, the recent adoption of said Bar By-Laws, this Court is without power, authority or jurisdiction to entertain, consider, decide, revive, remand or act upon Count I of said Complaint against your Respondent, heretofore dismissed by the Committee.

G. That Respondent recognizes that this Court has inherent power in matters going to the behavior, conduct and discipline of all lawyers in its geographical jurisdiction; but the Court also has the authority to promulgate a rule or rules creating and reserving its review of dismissed ethics complaints, and by the precise formulation of Section 17, the Court has not been silent on this point. Indeed, the Court has established the procedure whereby its inherent authority is to be exercised and under which this dismissed Count I is controlled.

H. That upon service of the first Complaint by the Legal Ethics Committee, on March 19, 1987, Respondent promptly filed a Motion to Strike in the captioned case, on or about March 23, 1987, invoking the protections of Sections 17, 18 and 19, which Motion, as of even date herewith, has not been accorded a disposition.

I. That upon service of the first Rule to Show Cause issued (July 22, 1987) in this cause, which was in response to the first Complaint submitted by the Legal Ethics Committee, the Respondent in his August 17, 1987 Reply to Rule to Show Cause and Objections to the aforesaid first Complaint, again raised the Federal Constitutional issues of the controlling features and specific language of Sections 17, 18 and 19, which organic defenses were intentionally or inadvertently passed over and not addressed by the Court in the opinion contained in *L.E.C. v. Douglas*, 370 SE2d 325 (W.Va. 1988).

J. That in addition to the Court's refusal to respond to Respondent's Federal Constitutional positions, timely and fairly raised, said Justices' unprecedented *sua sponte* action in *Douglas*, of invoking its "inherent authority" in

the "appropriate case" to resurrect, address and rule upon, a dismissed ethics complaint, in blatant disregard of its own rules (State Bar By-Laws Article VI, Sections 17, 18 and 19), irrespective of *res judicata* concepts, together with a retroactive application in a pending case, constitutes an obvious encroachment upon and a clear denial of Respondent's rights of due process and equal protection of the laws guaranteed by the XIV Amendment to the United States Constitution.

K. That for the Supreme Court of Appeals to revive, review and remand, *sua sponte* a dismissed ethics charge, and for said Court to find, as a matter of law, that an infraction had occurred regarding specific Disciplinary Rule (7-102), therefore, specifically charged, (in *Count I*, Paragraph [11], Subparagraph [c] of the June 24, 1986 Complaint), fully tried (on August 18, 19, 24 and September 15, 1986), and found wanting in the burden of proof (on October 25, 1986), infringes upon Respondent's due process and equal protection rights set forth in the XIV Amendment to the United States Constitution.

L. That without having observed the witnesses, said Justices' determination in *Douglas*, as a matter of law, that D.R. 7-102 had been violated, and their remand of the aforesaid dismissed ethics charge back to the original Hearing Panel with implied, but obvious directions to:

(1) reverse its finding of fact, and on essentially the same evidence, conclude that the Bar did indeed meet its burden; and,

(2) adopt their suggestion as to which Disciplinary Rules were violated; i.e., D.R. 7-102(A)(1) and D.R. 7-102(A)(2); and,

(3) apply, after the fact, a nebulous and "subjective" (Court's word) "unwarranted" and "knowing violation" test; and,

(4) provide the Bar with "extra innings" or a second opportunity to satisfy its burden of proof on the aforesaid Disciplinary Rule of this Count One, which had been heretofore plead (June 24, 1986, *Count I*, Paragraph [11], [c]), and found lacking in the proof offered in support thereof (October 25, 1986);

discards the prescribed procedural provisions for attorney discipline, and thereby denies this Respondent the full, fair and impartial protections and due process of said Bar By-Laws, in contravention of the due process and equal protection clauses of the XIV Amendment to the United States Constitution.

M. That the Court's *sua sponte* action in *Douglas*, on the dismissed ethics charge, notwithstanding the specific and heretofore practiced procedure of Article VI, Sections 17, 18, 19 and 20; its factual determination of attorney misconduct as a matter of law; its direction to the Hearing Panel to reverse its initial verdict of dismissal and find a violation of a specific Disciplinary Rule; and its subsequent assumption of its administrative/judicial role in attorney discipline, places the Court in the unique position of having been complainant, prosecutor, jury and now judge in this cause, which acts and omissions offend fundamental notions of fairness, consistency, *stare decisis*, and the due process and equal protection provisions of the XIV Amendment to the United States Constitution.

N. That the Court's failure or refusal to grant Respondent's April 28, 1987 and March 13, 1989 Motions

to Recuse heretofore regularly filed, for the reasons assigned therein, is, in and of itself, repugnant to the rights of due process and equal protection, advanced in the XIV Amendment to the United States Constitution.

O. That the Complainant's October 25, 1986 dismissal of the action which forms the basis for this second Complaint, breaches the equitable precepts or *res judicata;* however, if a disciplinary proceeding be deemed quasi-criminal, then Respondent does hereby assert the Federal Constitutional right against double jeopardy as found in the Fifth Amendment to the United States Constitution and applied to the States through the XIV Amendment.

P. That the Hearing Panel in this cause, who dismissed the same, and to whom the Court remanded this Count One in *Douglas,* refused on August 11, 1988 to reverse its October 25, 1986 findings herein. Therefore, absent a different finding of misconduct by the *original* Hearing Panel who first received the evidence, observed the witnesses and heard the argument of counsel, the Court's remand in *Douglas* remains unfilled, and consequently the Respondent's Federal Constitutional due process and equal protection rights have been impaled by the very terms of the Court's March 7, 1988 remand Order; i.e., the remand was to a *certain* Hearing Panel, and no other substitute body.

Q. That for a surrogate Hearing Panel to come to an entirely different factual and legal result herein, from a voluminous and cold record, without having seen or heard the Respondent, and without the benefit of having observed all witnesses therein appearing, deprives the

Respondent of his Federal due process and equal protection guarantees of the XIV Amendment to the United States Constitution.

R. That the rulings of the Supreme Court of Appeals in *Douglas, supra.*, to the extent that the same are applied retroactively and not prospectively in that pending case, for the purpose of reviewing or reviving a dismissed ethics complaint in order to implement a pre-announced disciplinary sanction, contravenes Respondent's due process and equal protection rights secured to him by the XIV Amendment to the United States Constitution.

S. For such other reasons apparent on the fact of the record.

JAMES WILSON DOUGLAS
pro se

/s/ James Wilson Douglas
JAMES WILSON DOUGLAS
Attorney at Law
100 North Hill Road, Box 425
Sutton, West Virginia 26601

[Entered March 31, 1989]

APPENDIX F

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

AT CHARLESTON

COMMITTEE ON LEGAL ETHICS
OF THE WEST VIRGINIA STATE BAR,

Complainant,

vs.

No. 19008
DISCIPLINARY PROCEEDINGS
(L.E.C. Docket No. 85-21)

JAMES W. DOUGLAS,
A MEMBER OF the West
Virginia State Bar,

Respondent.

PETITION FOR REHEARING

Comes now the Respondent, James Wilson Douglas, *pro se*, pursuant to Rule 24 of the Rules of Appellate Procedure of the West Virginia Supreme Court of Appeals, and does respectfully petition this Honorable Court for a rehearing, in the above-styled matter, of its Order of Suspension entered herein on the *14th* day of *July, 1989*, and Respondent does assign as his grounds, in support thereof, the following:

1. That this court's failure and refusal to abide by its own administrative rule, namely Article VI, Section 17(a) of the State Bar By-Laws, is violative of Respondent's Federal Constitutional rights to due process and equal protection of the laws. United States Constitution, Amendment XIV.

2. For such other reasons as may appear upon the hearing of this petition.

/s/ James Wilson Douglas
JAMES WILSON DOUGLAS
pro se

[Entered July 17, 1989]